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The Role of the Principle of Free, Prior, and Informed Consent in Fostering Development through Participatory Democracy

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Abstract

Applied within the developmental space, the principle of free, prior and informed consent (FPIC) espouses that communities have the right to give or withhold consent to proposed developmental activities or projects taking place on the lands that they own, occupy or use. Consent should be obtained before authorising development projects or activities, and it must be voluntary. Development entails improving people’s lives across all aspects, be they social, economic, or political. It is for this reason that everyone has the right to development. By virtue of this right, all human beings are entitled to be active participants in all activities regarding their development. This is where participatory democracy comes into the picture. Participatory democracy equates to communities fully participating in developmental activities within their territories. They do so by participating in all aspects of the developmental projects, including decision-making, conceptualisation, planning and execution. The FPIC principle advocates for meaningful public participation by communities affected by development. The main aim of this paper is to establish how the FPIC principle can foster development through participatory democracy. To

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achieve this objective, the paper will be structured as follows: discussion on the nature, content and origin of the FPIC principle; followed by a detailed analysis of participatory democracy and its relationship to the FPIC principle; and thereafter a discussion on development, with special focus on the right to development, and its relationship to both the FPIC principle and participatory democracy, will ensue. Although drawing on lessons from the global community, the study is set within the Southern African Development Community, with South Africa as the focal point.

Keywords: consent; communities; development; informed decisions; participatory democracy; public participation

1 INTRODUCTION

Ndizera and Muzee contend that Africa remains one of the poorest regions in the world, with almost one-third of the population being undernourished and lacking access to basic necessities such as clean water, electricity, education, healthcare systems and good road infrastructure.¹ It is perhaps this level of poverty that has prompted the African Union to devise an intervention development strategy, such as the African Agenda 2063. In the quest for development, particularly economic development, the tendency has been to pursue this goal at all costs, foregoing critical fundamental rights such as public participation, consultation, and beneficiary consent.

Generally, development benefits communities, particularly local communities. It is therefore logical that communities that are not only beneficiaries but are also affected by developmental projects within their territories must form an integral part of any development process from the beginning to the end, and their aspirations and sentiments should be considered. It is in this situation where the application of a people-centred approach to development, which advocates for “public participation, social learning, empowerment and sustainability”² becomes beneficial.

It is also in this instance where the principle of free, prior and informed consent (FPIC) becomes particularly relevant. The FPIC principle espouses that communities have the right to give or withhold consent to proposed development projects on the lands they own, occupy, or use. This means communities contribute to their own development. The process also enables communities to take ownership of development projects, as they have been involved at every stage. It is trite that, for developmental projects to succeed, affected communities should take ownership of them. There must be a buy-in from communities affected by the project. For communities to take full ownership of the project, they need to be fully informed about all aspects, both positive and negative. Only an informed community can give genuine consent on whether any project in its territory can proceed.

This article aims to identify the role of the FPIC principle in fostering community development through participatory democracy. This process envisages communities fully participating in developmental activities within their territories. To achieve this objective, the discussion in this article will be structured as follows: concepts of free, prior, and informed consent; participatory democracy; and development. These three concepts are intertwined, and an endeavour will be made throughout this article to link the relevance of each to the main question: the role of the FPIC principle in promoting community development through participatory democracy

When analysing the FPIC principle, the paper will discuss its origin, its development at international, regional, and national levels, and the international instruments that underpin its mandate. In participatory democracy, greater emphasis will be placed on public participation as

1 Ndizera and Muzee “A Critical Review of Agenda 2063: Business as Usual?” 2018 *Afr J Pol Sci Int Relat* 148.

2 Davids “Development Theories: Past and Present” in Davids, Theron and Maphunye *Participatory Development in South Africa* (2005) 17.

a catalyst for active citizenship. Active citizenry denotes a community actively involved in the running of its own affairs, an essential element of the FPIC principle. Regarding community development, the concept will be defined and analysed in relation to communities affected by developmental projects in the South African context. The article is written in the context of the Southern African Development Community (SADC), with South Africa as the case study.

2 THE PRINCIPLE OF FREE, PRIOR AND INFORMED CONSENT: ITS ORIGIN AND DEVELOPMENT

As noted above, free, prior, and informed consent is described as “the right of local and indigenous communities to give or withhold their consent to proposed development projects that may affect their lands, resources or lifestyle”.³ According to the United States Institute of Peace, free, prior, and informed consent essentially comprises the following:

Consent must be obtained free of coercion and manipulation. Such consent must be secured prior to any authorization by government or third parties, and prior to commencement of activities by a company affecting indigenous peoples’ lands, territories, and resources. Finally, the consent must be informed by meaningful participation and consultation of indigenous peoples based on the full disclosure of relevant aspects of the proposed project by the company and permit granting authority in a form that is understandable and accessible to indigenous peoples and local communities.⁴

It can be deduced from above that free, prior and informed consent comprises of three main elements:

- “Free” consent, which involves an element of voluntariness, meaning that communities should be “independent of manipulation and coercive influences”;⁵
- “Prior” consent, which implies that consent “must be secured prior to any authorization by government or third parties, and prior to commencement of activities by a company affecting indigenous peoples’ lands, territories, and resources”;⁶ and
- “Informed” consent, which means the “right to make decisions and the ability to make [such] decisions.”⁷

The above detailed definition of FPIC links well with concepts of development and participatory democracy. This is particularly evident in the right to development. The Declaration on the Right to Development defines the right to development as “an inalienable right by virtue of which every human person and all peoples are entitled to *participate in, contribute to, and enjoy economic, social, cultural and political development*, in which all human rights and fundamental freedoms can be fully realised.”⁸ The phrases “to participate in”, “contribute to”, and “enjoy economic, social, cultural and political development”, incisively captures the essence of FPIC as defined above. The interconnection among FPIC, participatory democracy, and development

3 Forest Peoples Programme: FPP and partners launch pioneering book on Indigenous Peoples and “Free, Prior and Informed Consent” in the Democratic Republic of Congo, <https://rightsandresources.org/blog/forest-peoples-programme-fpp-and-partners-launch-pioneering-book-on-indigenous-peoples-and-free-prior-and-informed-consent-in-the-democratic-republic-of-congo/> (accessed 07-06-2025).

4 Gary “Growing Support for Community Consent Rights for Natural Resource Development” (2011) Oxfam 9 Jun <https://politicsofpoverty.oxfamamerica.org/growing-support-for-community-consent-rights-for-natural-resource-development/> (accessed 07-06-2025).

5 Beauchamp and Childress *Principles of Bio-medical Ethics* (1989) 106.

6 *Ibid* 3.

7 Swanepoel and De Beer *Community Development: Breaking the Cycle of Poverty* (1992) 30.

8 *Ibid*.

will be further explored in the discussion below.

The FPIC principle in the developmental space is still in its infancy and emerging phase. The development of the principle can be traced to the Southern African Development Community (SADC) at both regional and international levels, as discussed below. The main sources of the principle, primarily legal instruments, will be discussed below.

2 1 Development of the Free, Prior and Informed Consent Principle within SADC

Within SADC, South Africa can be identified as a country in which the FPIC principle is gradually developing. This is done through legislation, court judgments and development policies. Regarding legislation, section 82 of the National Environmental Management: Biodiversity Act⁹ states that an authority may only issue a bio-prospecting permit if the applicants can show that they obtained a *prior consent* from the affected indigenous community. Furthermore, Regulation 39 (1) of the 2014 Environmental Impact Assessment Regulations¹⁰ requires that, before a proponent or an agent who is not an owner of the land or someone who controls that land applies for an environmental authorisation to perform certain activities on that land, such a person must first obtain a written consent from the owner of the land or the person who controls such land. This is complemented by the Interim Protection of Informal Land Rights Act¹¹ (IPILRA) which states that no person may be deprived of any informal right to land without their *consent*.

Still in South Africa, the courts have recently issued judgments confirming the application of the FPIC principle in the country's developmental context. In the case of *Maledu v Itereleng Bakgatla Mineral Resources*,¹² the Constitutional Court stated that "IPILRA provides that no person may be deprived of any informal right to land without his or her consent."¹³ The court went further to accept the *amici's* submission that for the consent contemplated in section 2(1) to be effectual, "it must be free, granted prior to deprivation and be informed."¹⁴ Furthermore, the High Court in *Baleni v Minister of Mineral Resources*¹⁵ agreed with the *amicus* that the community's free, prior and informed consent was required before mining activities could take place on its land.¹⁶ Regarding development policies, although most major development programmes allude to the spirit of FPIC, only the National Development Plan, South Africa's current development masterplan, explicitly mentions FPIC as a catalyst for development.

2 2 Development of the Principle of Free, Prior and Informed Consent at Regional Level

In Africa, regional institutions have made important pronouncements on FPIC-related issues. At its 6th Ordinary Session, the Pan-African Parliament called upon all member states to ensure that all investments were subject to the *free, prior, and informed consent* of affected communities.¹⁷ In the case of *Social and Economic Rights Action Centre (SERAC) v Nigeria*¹⁸ (also known as

9 Act 10 of 2004.

10 National Environmental Management Act, 1998 (act No. 107 of 1998): Environmental Impact Assessment Regulations 2014.

11 Act 31 of 1996.

12 *Grace Maledu v Itereleng Bakgatla Mineral Resources (Pty) Ltd* [2018] ZACC 41.

13 *Ibid* para 96.

14 *Ibid* para 72.

15 *Duduzile Baleni v Minister of Mineral Resources* and [2019] 1 All SA 358 (GP).

16 *Ibid* para 20.

17 Pan-African Parliament "Recommendations and Resolutions, Sixth Ordinary Session" (16-20 Jan 2012) OAU Doc PAP2/RECOMS/VI 6.

18 [AHLR 60 (ACHPR 2001) (SERAC)].

Ogoni v Shell and BP), the African Commission on Human and Peoples' Rights (the African Commission) found that the right to a satisfactory environment provided for the government to undertake environmental and social impact assessments and to grant access to information to the population and regulatory bodies.

In another case,¹⁹ the African Court on Human and Peoples' Rights found that by evicting the Ogiek people from their land against their will and without prior consultation and consent, the Kenyan government had violated their rights, including the rights to property, freedom of religion, culture, life, and development. This was followed by the *Endorois* case,²⁰ where the African Commission found a lack of proper consultation before the community was removed from its land for the establishment of a game reserve.

There are also regional instruments that have provisions promoting the FPIC principle. The African Charter for Popular Participation in Development and Transformation²¹ recognises the importance of public participation in development projects. In addition, the African Convention on the Conservation of Nature and Natural Resources²² requires that prior, informed consent of affected communities be obtained regarding indigenous knowledge and traditional rights.

It is clear from the above discussion that the FPIC principle is gaining ground at regional level. This is evident from the pronouncements of some of Africa's most prominent institutions, and from the provisions of the regional instruments. The following section examines the situation at international level.

2 3 Development of the Principle of Free, Prior, and Informed Consent at International Level

Internationally, the FPIC principle originates mainly from the international discourse on human and indigenous peoples' rights,²³ with the following international instruments being the primary sources: the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),²⁴ the International Labour Organisation Convention on Indigenous and Tribal Peoples in Independent Countries,²⁵ the United Nations (UN) Resolution on the Second International Decade of the World's Indigenous People²⁶ and the Declaration on the Rights of Indigenous Peoples,²⁷ and the Declaration on the Right to Development.²⁸

Article 16(2) of the ILO Convention on Indigenous and Tribal Peoples in Independent Countries states that where *exceptional reasons* (my emphasis) exist for the relocation of indigenous and tribal peoples from their lands, such removal can take place only with their *free and informed*

19 *African Commission on Human and Peoples' Rights v Republic of Kenya*, ACTHPR, 006/2012.

20 *Centre for Minority Rights Development v Kenya* (2009) AHHLR 75 (ACHPR 2009).

21 The African Charter for Popular Participation in Development and Transformation was adopted in Feb 1990 in Arusha, Tanzania, at the International Conference on Popular Participation in the Recovery and Development Process in Africa. <https://repository.uneca.org/handle> (accessed 07-04-2025).

22 The African Convention on the Conservation of Nature and Natural Resources was signed in Algiers, Algeria, in Sep 1968. Article 17 of the Convention requires that prior informed consent of affected communities be obtained regarding indigenous knowledge and traditional rights.

23 Roesch "The Story of Legal Transplant: The Right to Free, Prior and Informed Consent in Sub-Saharan Africa" 2016 *AHRLJ* 505–531.

24 Convention on the Elimination of All Forms of Racial Discrimination, (adopted 21 Dec 1965, effective 4 Jan 1969).

25 ILO Indigenous and Tribal Peoples Convention, 1989 (no. 169).

26 UN Resolution on the Second International Decade of World's Indigenous People (Resolution A/res/59/174 of 22 Dec 2004).

27 UN Declaration on the Rights of Indigenous Peoples (UN GA Resolution A/61/295 of 13 Sep 2007).

28 UN Declaration on the Right to Development (UN GA Resolution 41/128 of 4 Dec 1986).

consent.²⁹ This is supported by Article 10 of the Declaration on the Rights of Indigenous Peoples, stating that no relocation of indigenous peoples from their territories should take place without their free, prior, and informed consent.³⁰ Furthermore, the ICERD indicates that no decisions affecting indigenous peoples should be taken without their informed consent,³¹ whereas the UN's Second International Decade of World's Indigenous Peoples is to the effect that the inclusion of the affected indigenous peoples, as well as their participation in processes at all levels, is key to successful development.³²

Besides international instruments, there are other institutions and forums tasked with promoting and implementing the FPIC principle at international level, including various bodies within the UN system, international financial institutions, and regional courts. A brief discussion on such institutions and forums follows below.

According to the Joint Statement of the Permanent Forum on Indigenous Issues, FPIC is an established international human rights norm in the context of human rights and climate change.³³ The International Finance Corporation (IFC) further emphasises the need to respect indigenous peoples' human rights and to obtain *free, prior, and informed consent*.³⁴ Furthermore, the Equator Principles³⁵ calls for member companies of the IFC to seek and obtain *free, prior, and informed consent* of indigenous peoples when conducting development projects in their areas of jurisdiction.³⁶ Lastly, in 2013, the International Council on Mining and Metals adopted the free, prior, and informed principle, and instructed its members to “work to obtain *consent* of indigenous peoples, respect their rights and interests, and to engage in consultative processes that ensure meaningful participation of indigenous communities in decision making.”³⁷

Regarding international courts of law, the most recent case is that of *Angela Poma v Peru*.³⁸ In this case, the Human Rights Committee found that the cultural and religious rights of the Aymara people were violated when that community was deprived of access to water without their *free and informed consent*.

Still, at international level, certain countries have applied the FPIC principle through legislation and court decisions. For example, sections 25 and 35 of the Canadian Constitution Act, 1982,

29 Article 16(2) of the Indigenous and Tribal Peoples Convention.

30 Article 10 of the UN Declaration on the Rights of Indigenous Peoples (A/RES/61/295) 13 Sep 2007.

31 General Recommendation XXIII of the UN Committee on the Elimination of Racial Discrimination (UN Doc. A/52/18, 1997).

32 UN General Assembly Second International Decade of the World's Indigenous People (Resolution A/res/59/174 of 22 Dec 2004).

33 Joint Statement – Permanent Forum on Indigenous Issues, 10th Session, New York, May 18, 2011, <https://docs.un.org/en/E/2011/43> (accessed 19-06-2024).

34 See Standard 7 of International Finance Corporation (IFC) “Sustainability framework: Policy and Performance Standards on Environmental and Social Sustainability Access to Information Policy” (effective from 1 Jan 2012). Also see the IFC's “International Finance Corporation Activities related to Indigenous Peoples' Issues” Jan 2014 <https://www.un.org/esa/socdev/unpfii/documents/2014/ifc.pdf> (accessed 07-07-2024).

35 IFC “The Equator Principle: A Financial Industry Benchmark for Determining, Assessing and Managing Social and Environmental Risk in Project Financing” (effective from Jun 2006). These Principles form an environmental and social risk management framework adopted by international financial institutions, and help these institutions determine, assess and manage such risks <https://www.equator-principles.com/> (accessed date 07-07-2024).

36 Lehr “The Revised Equator Principles Call on Companies to Seek Free, Prior, and Informed Consent. Next up: Governments?” 7 Sep 2012 Global Business and Human Rights <https://www.lexology.com/library/detail.aspx?g=b3a1c79b-790c-4d1b-bf31-b25836676b91> (accessed 06-08-2024).

37 International Council on Mining and Metals “Indigenous Peoples and Mining Position Statement” <https://www.icmm.com/en-gb/our-principles/position-statements/indigenous-peoples> (accessed 27-06-2024).

38 *Angela Poma v Peru* CCPR/C/95/D/1457/2006 7.6.

require authorities to consult with Aboriginal peoples before transacting on lands they claim or on which they have existing rights.³⁹ This constitutional duty to consult with indigenous people has also been enforced by the courts in Canada. A reference in this regard can be made to the case of *Haida First Nation v British Columbia (Minister of Forests)*,⁴⁰ where the Canadian Supreme Court held that the government had a duty to consult with Aboriginal people before undertaking development projects on claimed lands.⁴¹ The court in *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*⁴² reached the same conclusion.

In the *Kalina and Lokono Peoples v Suriname* case, the Suriname government conceded that the FPIC principle was “an international requirement that States should adhere to when consulting indigenous and tribal people.”⁴³ The Suriname authorities further indicated that they were “committed to developing a protocol that reflects the principle of free, prior, and informed consent of the peoples.”⁴⁴

In conclusion, this section defined the FPIC principle and traced its origin and development. The principle is said to have originated in indigenous peoples’ discourse and to have been further developed through various instruments and institutions at international, regional, and national or local levels. This narrative indicates the evolutionary and devolutionary development of the FPIC principle and its application international, regional, and national levels.

Now that the definition, origin, and application of the FPIC principle are clear, the next section will address the concept of participatory democracy. The relationship between the two concepts, as it pertains to development, will be explored in detail.

3 FREE, PRIOR, AND INFORMED CONSENT AND PARTICIPATORY DEMOCRACY

Consequent to the analysis of the FPIC principle above, it is now time to examine the link between the principle and participatory democracy. The linkage is vital as the two concepts are critical to community development — an idea that will be discussed in detail in the next section. To this end, the discussion will focus on the conceptualisation of participatory democracy, its core elements, and how the FPIC principle can be employed to enhance the effectiveness of the concept in relation to community development. The narration in this section is mainly centred on the South African context, with the country’s legislation, court judgments, and development policies or strategies used as examples of the evolution and application of FPIC and participatory democracy in the SADC subregion.

3 1 Overview of Participatory Democracy — a Conceptual Overview

Participatory democracy denotes a process in which people affected by development projects or programmes (local communities) are involved in shaping the nature and direction of these projects. Their full participation from inception to finalisation of the project is paramount and,

39 See Thomas “The Duty to Consult and Environmental Assessments: A Study of Mining Cases from across Canada” (Thesis, University of Waterloo, 2015). Thomas analyses 20 cases dealing with the duty consult Aboriginal peoples in Canada. He points to the cases of *Haida First Nation v British Columbia (Minister of Forests)* and *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)* as precedents on the duty to consult affected indigenous people.

40 *Haida First Nation v British Columbia (Minister of Forests)* [2004] 3 S.C.R. 511, 2004 SCC 73.

41 *Ibid.*

42 *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)* [2004] 3 S.C.R. 550, 2004 SCC 74.

43 General Recommendation XXIII of the UN Committee on the Elimination of Racial Discrimination (UN Doc. A/52/18, 1997) para 204.

44 *Ibid.*

according to the FPIC principle discussed in the preceding section, enables affected communities to have the final say on whether a project should proceed.

Swanepoel and De Beer equate participatory democracy more to the decision-making process and opine that “it is the democratic right of the people to participate in matters affecting their future. Every adult, whether relatively poor, poor, or the poorest of the poor, has a right to be part of the decision-making mechanism affecting his or her development.”⁴⁵ The same authors state further as follows:

When people are mobilised to participate, they do so fully in all aspects of the project. Then they become part of the decision-making and planning of the project. They are part of the implementation and the evaluation of the project. And, if need be, they decide on the project course adaptations to keep the project on track; in short, they then participate fully in the management of the project.⁴⁶

As narrated above, public participation is key to participatory democracy. According to the FPIC principle, community members must have the capacity to meaningfully participate and engage throughout the project for public involvement to be effective. Basic requirements for effective public participation include, amongst others, the following: education; access to information; a voice in decision-making; transparent decision-making; post-project analysis and monitoring; enforcement structures; and recourse to independent tribunals for redress.⁴⁷

Cornwall and Coelho lament the negative impact of the lack of capacity by community members participating in development projects as follows:

For people living in poverty, subject to discrimination and exclusion from mainstream society, the experience of entering a participatory space can be extremely intimidating. How they talk and what they talk about may be perceived by professionals as scarcely coherent or relevant; their participation may be viewed by the powerful as chaotic, disruptive and unproductive.⁴⁸

Furthermore, each development project needs to be sustainable. Participatory democracy, through public participation by capacitated community members, plays a vital role in ensuring both the viability and sustainability of development projects. In the context of environmental management, Principle 10 of the Rio Declaration states that developmental projects are best managed with the participation of all affected citizens.⁴⁹

3 2 Participatory Democracy within the South African Context

Moving closer to home, participatory democracy, as discussed above, has been fostered in the South African developmental space through legislation, court cases, and development policies or strategies. A general discussion on this matter was undertaken in the preceding section, focusing on the development and application of the FPIC principle in South Africa. In this subsection, certain key areas, such as legislation, judicial pronouncements, and policies and strategies, may be revisited, but only insofar as they relate to participatory democracy.

3 2 1 Legislation

It all starts with the Constitution of the Republic of South Africa, 1996. Section 195 of the Constitution obligates the public to participate in policymaking. In particular, section 195 (1)

45 Swanepoel and De Beer *Community Development: Breaking the Cycle of Poverty* 4 ed (2006) 28–29.

46 *Ibid.*

47 Ramlogan *Sustainable Development: Towards a Judicial Interpretation* (2010) 164.

48 Cornwall, Schattan and Coelho *The Politics of Participation in New Democratic Arenas* (2007) 13.

49 The Rio Declaration on Environment and Development, Rio de Janeiro, Brazil, 1992.

(e) indicates that people's needs must be responded to, and that the public must be encouraged to participate in policymaking.⁵⁰ It can therefore be asserted that the Constitution lays the basis for public participation within the South African developmental space.

When it comes to enabling legislation, almost all laws governing development in South Africa include elements of participatory democracy, particularly public participation. The legislation in question comprises laws governing land use management, mining, and environmental management.

(a) Land use and management legislation

All the land use and management legislation, including the repealed Development Facilitation Act,⁵¹ Local Government Municipal Systems Act,⁵² Municipal Structures Act⁵³ and the Spatial Planning and Land Use Management Act⁵⁴ contain provisions on public participation requirements. All these Acts relate to local government, which is the sphere entrusted with community development.

The above legislation also encourages active participation by citizens or community members in matters relating to development. As Rogerson puts it, developmental local government means "local government committed to working with citizens and groups within the community to find sustainable ways to meet their social, economic and material needs and improve the quality of their lives."⁵⁵ This sentiment was echoed by the African National Congress (ANC), which indicated that "development is not about the delivery of goods to passive citizenry. It is about active involvement and growing empowerment."⁵⁶

In its preamble, the Municipal Structures Act indicates some of the constitutional obligations of municipalities as "to ensure sustainable, effective and efficient municipal services, promote social and economic development, encourage a safe and healthy environment by *working with communities* in creating environments and human settlements in which all our people can lead uplifted and dignified lives."⁵⁷ Cornwall and Coelho are of the same view, indicating that "enabling citizens to engage directly in local problem-solving activities and make their own demands directly to state bodies is believed to improve understanding, and contribute to improving the quality of definition and implementation of public programmes and policies."⁵⁸

The Spatial Planning and Land Use Management Act (SPLUMA) also provides for "inclusive, developmental, equitable and efficient spatial planning that [has] to be achieved through the process of spatial justice, which advocates that plans must include everyone."⁵⁹ Inclusive planning presupposes a consultative process with affected and interested parties. This is critical

50 Section 195(1)(e) of the Constitution of the Republic of South Africa, 1996.

51 Act 55 of 1995, repealed by SPLUMA.

52 Act 32 of 2000.

53 Act 117 of 1998.

54 Act 16 of 2013.

55 Rogerson "Local Economic Development in Post-Apartheid South Africa: A Ten-year Research Review" in Padayachee (ed) *The Development Decade? Economic and Social Change in South Africa, 1994–2004* (2006) 229.

56 African National Congress *The Reconstruction and Development Programme: A Policy Framework* (1994) 5.

57 Preamble, Municipal Structures Act.

58 Cornwall and Coelho "The Politics of Participation in New Democratic Arenas" in Cornwall and Coelho *Spaces for Change: The Politics of Citizen Participation in New Democratic Arena* (2006) 228.

59 Afesis-corporation 2015 SPLUMA Information Booklet 5.

to both participatory democracy and the FPIC principle.

Although it can be inferred that there are strong sentiments in favour of public participation and consultation in every Act of Parliament discussed above, this does not necessarily translate into practical implementation on the ground. This is due to several factors, including weak or absent decision-making capacity among affected communities, a lack of capacity among government officials to implement relevant legislation, and uneven power dynamics between affected communities and municipal authorities, especially in rural areas.⁶⁰ When properly applied, the FPIC principle can address some of these constraints, thereby enhancing participatory democracy in the developmental context.

(b) Environmental management legislation

Similarly, the legislation relating to environmental management under the auspices of the National Environment Management Act⁶¹ (NEMA) contains provisions that require public participation and consultation of communities affected by development activities. The laws in question include the following: the National Environmental Management: Waste Act,⁶² the National Environmental Management Act,⁶³ the National Environmental Management: Air Quality Act,⁶⁴ the National Environmental Management: Integrated Coastal Management Act,⁶⁵ the National Environmental Management Act: Biodiversity⁶⁶ and the Environmental Conservation Act.⁶⁷

NEMA states that “the law should establish procedures and institutions to facilitate and promote public participation in environmental governance ... and that the law should facilitate the enforcement of environmental laws by civil society.”⁶⁸ A reference to civil society is significant, as it extends the importance of public participation beyond communities directly affected by development activities.

Section 2(f) and (h) of NEMA goes further and says that “the participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation by vulnerable and disadvantaged persons must be ensured.”⁶⁹ This assertion aligns with the community capacitation requirement of the FPIC principle.

(c) Water use and management legislation

The same goes for the water management and mining legislation. Both the National Water Act⁷⁰ and the Water Services Act⁷¹ contain provisions relating to public participation and consultation. The National Water Act, the Water Services Act and their Regulations are two pieces of legislation that govern water management in South Africa. The National Water Act seeks “to establish suitable institutions and to ensure that they have appropriate *community*,

60 Legal Resources Centre *Free, Prior and Informed Consent in the Extractives Industries in Southern Africa* (2018) 59–60.

61 Act 107 of 1998.

62 Act 59 of 2008.

63 Act 57 of 2003.

64 Act 39 of 2004.

65 Act 24 of 2008.

66 Act 10 of 2004.

67 Act 73 of 1989.

68 Preamble to NEMA.

69 Section 2(f) of NEMA.

70 Act 36 of 1998.

71 Act 108 of 1997.

racial and gender representation (my emphasis).⁷²

It can be inferred that the Act seeks to promote public participation through representation, a crucial aspect under the FPIC principle. Furthermore, sections 5, 8, 10, and 39 of the Act require a consultative process in which affected parties are informed about the project and are requested to submit their comments. These pre-project consultations are essential to promoting public participation from the project's inception. Pre-project public participation enables authorities to identify communities' relevant needs and avoid providing services they do not need.

The Water Services Act seems to limit consultation to the water services development plan. Section 14 of the Act requires a water services authority to notify affected and interested parties of its draft water services development plans. The Act further states that a water services authority must consider all received comments before adopting a development plan.

The consultative processes of both the National Water Act and the Water Services Act do not fully satisfy the requirement of meaningful engagement with affected communities as required by the FPIC principle. However, the requirement that affected parties be allowed to make submissions and submit objections that must be considered and responded to by the Minister goes a long way toward fostering the spirit of the FPIC principle and, in turn, participatory democracy.

(d) Mining legislation

On the mining front, section 10 of the Mineral and Petroleum Resources Development Act⁷³ requires that parties that may be affected by the granting of a mining right on a particular land be consulted before the granting of such rights. The Act calls for a notice to be published within 14 days of accepting the application by the Regional Manager, indicating that an application for a prospecting right, mining right or mining permit has been received in respect of the land in question; and for interested and affected parties to submit their comments within 30 days of such notice.

Furthermore, section 22(4)(b) of the Act requires the applicant to "notify and consult with interested and affected parties within 180 days from the date of notice." The fact that the Act requires the application to be published and calls for public comments from interested and affected parties points towards a public participation process.

The Courts have insisted that community consultations and engagements with affected and interested parties, as required by the MPRDA, be meaningful.⁷⁴ In the mining case of *Benwenyama Minerals and Genorah Resources*,⁷⁵ the Constitutional Court found that neither the Department nor Genorah Resources conducted meaningful consultation with the community, as required by the MPRDA.⁷⁶ The court, the importance of consultation, indicated that the purpose of engaging with the landowners was to inform them about the potential impact of granting prospecting rights on their land. Such engagement was also intended to provide sufficient information to enable landowners to make informed decisions should they choose to make representations to the Department regarding the granting of the prospecting right.⁷⁷ The court further emphasised that consultation should be in good faith at all times. Humby indicates that

⁷² *Ibid.*

⁷³ Act no. 28 of 2002.

⁷⁴ In *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 39, Sachs J pointed out that meaningful engagement requires the parties to "engage with each other in a proactive and honest endeavour to find mutually acceptable solutions."

⁷⁵ *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC).

⁷⁶ *Ibid* para 19.

⁷⁷ *Ibid* paras 64 and 67.

“a good faith standard should require that mining applicants invest more time and money in the public participation process.”⁷⁸

The above Constitutional Court judgment indicates, to some extent, that the MPRDA and the mining regulatory regime in general are moving closer to the FPIC principle by insisting on meaningful public participation. By enabling landowners to submit informed inputs to the authorities before a mining right can be granted, the Act contributes to meaningful engagement between the parties.

3 2 2 The Judiciary

In addition to the pronouncements by the courts in the *Bengwenyama Minerals* discussed above, the Courts have also made other important decisions specifically relating to participatory democracy, public participation and consultation. In *Matatiele Municipality v President of the Republic of South Africa*, the Court stated as follows:

Our Constitution contemplates a democracy that is representative, and that also contains elements of participatory democracy. As the preamble openly declares, what is contemplated is “a democratic and open society in which government is based on the will of the people.” Consistent with this constitutional order, section 118(1)(a) calls upon the provincial legislatures to “facilitate public, particularly involvement in their legislative and other processes ...”⁷⁹

The essence of the above judgment is that it directly refers to participatory democracy and government based on the will of the people. The “government based on the will of the people” part satisfies the FPIC principle’s “free” element.

In *Doctors for Life International v The Speaker of the National Assembly*, the Court, with reference to section 72 of the Constitution, indicated that

commitment to principles of accountability, responsiveness and openness shows that our constitutional democracy is not only representative but also contains participatory elements... It is apparent from the preamble of the Constitution that one of the basic objectives of our constitutional enterprise is the establishment of a democratic and open government in which the people shall participate to some degree in the law-making process.⁸⁰

The above pronouncements not only augment the sentiments expressed in the *Matatiele Municipality* case regarding participatory democracy based on the will of the people but also go further to reiterate the public’s right to participate in the government’s law-making process by engaging in the legislative process.

In the recent case of *Minister of Mineral Resources and Energy v Sustaining the Wild Coast NPC*⁸¹ the Supreme Court of Appeal reiterated that it was imperative to provide interested and affected persons with detailed information so they could make informed decisions. The court further indicated that meaningful consultation is integral to ensuring procedural fairness. These court pronouncements are in line with the requirements of the FPIC principle and participatory democracy.

3 2 3 Developmental Policies and Programmes

Concerning developmental policies or strategies, the South African government has since 1994 adopted the following programmes: the Reconstruction and Development Programme (RDP),

78 Humby “The Bengwenyama Trilogy: Constitutional Rights and the Fight for Prospecting on Community Land” 2012 *PER* 6.2.

79 *Matatiele Municipality v The President of the Republic of South Africa* 2006 2 ZA (CC) para 40.

80 *Doctors for Life International v The Speaker of the National Assembly* 2006 5 ZA (CC) para 111.

81 *Minister of Mineral Resources and Energy v Sustaining the Wild Coast NPC* [2024] ZASCA 84.

the Growth, Employment and Redistribution Programme (GEAR), the Accelerated and Shared Growth Initiative – South Africa (ASGISA), the National Growth Path (NGP) and the National Development Plan (NDP). Most, if not all, of these programmes have provisions regarding participatory democracy through public participation and consultation. The relevant objectives of some of these programmes will be briefly discussed below.

(a) The Reconstruction and Development Programme

Adopted in 1994, the RDP was the first major socio-economic programme of post-apartheid South Africa. It is through this programme that the South African government undertook to create employment opportunities, alleviate poverty and reduce extreme inequalities amongst South Africans.⁸² To achieve these objectives, South Africa had to develop democratic institutions that were representative and participatory.⁸³

According to the RDP White Paper, the programme had to ensure that the country developed democratic institutions and practices characterised by representativeness and participation. Furthermore, the RDP was described as “an integrated, people-centred development approach [...] characterised by integration between decision-makers from the public, private and voluntary sectors and the intended beneficiaries of development (i.e. the people).”⁸⁴

It can be deduced from the above narrative that the RDP was, at least in theory, an embodiment of participatory democracy and the spirit of the FPIC principle. The assessment of the programme’s actual implementation of these objectives does not form part of this article.

(b) Growth, Employment and Redistribution Programme

The Growth, Employment, and Redistribution programme was a macroeconomic strategy adopted by the South African government in 1996 as a “five-year plan aimed at strengthening economic development, broadening of employment and redistribution of income and socio-economic opportunities in favour of the poor.”⁸⁵ The long-term vision of this policy included “increasing participation in the democratic institutions of civil society.”⁸⁶ Although this suggests that the programme was leaning towards a public participatory trajectory, other observers hold different views. Barberton *et al* argue that government policy has shifted from “people-centred” development approach of the RDP to the adopting of GEAR strategy which, in essence, is a private-sector driven growth strategy. It is ironic that this new growth policy’s success is dependent on the good will and interests of the very groups that benefited most from the policies of the apartheid regime.⁸⁷

If the above observation is correct, this will mean that an excellent opportunity to utilise an important development programme to foster participatory democracy has been lost.

(c) National Development Plan

Introduced in 2013, the overall goal of the NDP is to eliminate poverty, alleviate unemployment and reduce inequality by 2030. Of critical importance to the discussion at hand is the fact that the NDP

82 United Nations Development Programme “South African Human Development Report” 2000 iii. <https://hdr.undp.org/system/files/documents/southafrica2000en.pdf> (accessed 23-05-2024).

83 Ministry in the Office of the President “White Paper on Reconstruction and Development” *Government Gazette* para 1.2. https://www.gov.za/sites/default/files/gcis_document/201409/160850.pdf (accessed 23-11-2024).

84 Davids, Theron and Maphunye *Participatory Development in South Africa* 18.

85 *Ibid.*

86 See Department of Finance: Republic of South Africa “Growth, Employment and Redistribution: A Macroeconomic Strategy” 1996.

87 Barberton, Blake and Kotze (eds) *Creating Action Space: The Challenges of Poverty and Democracy in South Africa* (1997) 5.

calls for citizens to be active in their own development. The NDP states as follows:

In many respects, South Africa has an active and vocal citizenry, but an unintended outcome of government actions has been to reduce the incentive for citizens to be direct participants in their own development. To prevent this practice from being entrenched, the state must actively support and incentivise citizen engagement and citizens should actively seek opportunities for advancement, learning, experience and opportunity; work together with others in the community to advance development, resolve problems and raise the concerns of the voiceless and marginalised; and hold government, business and all leaders in society accountable for their actions.⁸⁸

The above quotation captures the gist of NDP as a national strategy based on the will of the people, and by the people, in that communities are required to directly and actively participate in their own development. Furthermore, one of the six pillars of the NDP is the development of an active citizenry which holds its leaders accountable.⁸⁹ The NDP indicates that “active citizenry and social activism is necessary for democracy and development to flourish. The state cannot merely act on behalf of the people — it has to act with the people, working together with other institutions to provide opportunities for the advancement of all communities.”⁹⁰ These sentiments portray that the NDP is wholly aligned with the FPIC principle. Moreover, these sentiments are in complete congruence with the notion of participatory democracy.

Stemming from the analysis of the development policies above, public participation is the golden thread running through all these programmes and initiatives. Public participation is a key element of participatory democracy, embodying the FPIC principle as its essential ingredient. Although the other two programmes, namely ASGISA and the NGP, do not directly refer to participatory democracy, public participation or FPIC, the development process of both programmes was said to be consultative, thus inculcating the spirit of the FPIC principle and participatory democracy.

4 FREE, PRIOR, AND INFORMED CONSENT, PARTICIPATORY DEMOCRACY AND DEVELOPMENT

The preceding two sections provided insights into the content of the FPIC principle and its relationship with the concept of participatory democracy in general, and public participation in particular. The FPIC principle and participatory democracy are intertwined, with the former acting as a catalyst for the latter. With this narrative in mind, it is now opportune to examine how the FPIC principle, through participatory democracy, can foster and enhance development.

4 1 Development — A Conceptual Overview

Before discussing its relationship with the FPIC principle and participatory democracy, it may be beneficial to provide a succinct overview of the concept of development. Generally, development consists of “a plethora of dimensions and aspects as they relate to health, education, nutrition, shelter, access to information, participation, nature of regime (degree of democracy and liberty) and many more.”⁹¹ Other authors take the discourse further, with Myrdal indicating

88 National Planning Commission “National Development Plan 2030” 2012 30.

89 *Ibid* 25.

90 National Development Plan Executive Summary 30.

91 Thorbecke “The Evolution of the Development Doctrine 1950–2005” in Mavrotas and Shorrocks (eds) *Advancing Development: Key Themes in Global Economics* (2007) 29.

that development means:

the movement upwards of the entire social system [...]. This social system encloses, besides the so-called economic factors, all non-economic factors, including all sorts of consumption by various groups of people; consumption provided collectively; education and health facilities and levels; the distribution of power in the society; and more generally economic, social and political stratification ...⁹²

The above sentiments are shared by Todaro, who details the objectives of development as follows:

to increase the availability and widen the distribution of basic life-sustaining goods such as food, shelter, health and protection; to raise levels of living, the provision of more jobs, better education, and greater attention to cultural and humanistic values [...]; to expand the range of economic and social choices of individuals and nationals by freeing them from servitudes and dependence not only in relation to other people and nation states but also to the forces of ignorance and human misery.⁹³

Arndt has this to say about development: “the questions to be asked about a country’s development are therefore: what has happened to poverty? What has been happening to unemployment? What has been happening to inequality?”⁹⁴

Development is therefore about improving people’s lives, hence the right to development. The Declaration on the Right to Development describes the right to development as “an inalienable right by virtue of which every human person and all peoples are entitled to *participate in, contribute to, and enjoy economic, social, cultural and political development*, in which all human rights and fundamental freedoms can be fully realised.”⁹⁵ Tlakula goes further to indicate that “the human person is the subject to development and should be an active participant and beneficiary of the right to development.”⁹⁶

The above assertion suggests that communities, as subjects to development, should be active participants and beneficiaries of the right to development. This notion aligns well with the contention that, if development is supposed to be for the benefit of communities, it is imperative that these communities be part of the development process from inception to conclusion, and that their aspirations and sentiments be taken into consideration.⁹⁷ The linkage between development and active beneficiary participation aligns well with both participatory democracy and the FPIC principles, which leads us to the following discussion.

4 2 Linkage between the FPIC Principle, Participatory Democracy, and Development

The first nexus between the FPIC principle and development can be gleaned from the definition of the two concepts. In the introductory section, FPIC was described as “the principle that a community has the right to give or withhold consent to proposed projects that may affect the lands they customarily own, occupy or otherwise use,”⁹⁸ whereas in this section development was said to consist of “a plethora of dimensions and aspects as they relate to health, education, nutrition, shelter, access to information, participation, nature of regime (degree of democracy

92 Myrdal “What is Development?” 1974 *JEI* 965.

93 Todaro *Economic Development* 7 ed (2000) 14.

94 Arndt *Economic Development* (1987) 91.

95 Declaration on the Right to Development (GA RES 41/128 1986).

96 Tlakula “Human Rights and Development” in McConnaghay and Tiyambe Zeleza (eds) *Human Rights, the Rule of Law and Development in Africa* (2004) 110.

97 <http://www.Uir.unisa.ac.za/bitstream/handle> (accessed 08-05-2018).

98 Forest Peoples Programme “Free, Prior and Informed Consent” <https://www.forestpeoples.org/who-we-are/our-core-principles/free-prior-and-informed-consent-fpic/> (accessed 09-02-2013).

and liberty) and many more.”⁹⁹

References to “access to information” and “participation” in the definition of development have an important bearing on the essential elements of the FPIC principle. Access to information enables affected communities to make informed decisions as to whether to consent to proposed development projects. On the other hand, participation in decision-making processes enables communities to take ownership of projects, thereby avoiding conflicts and disputes later in their implementation. This is a crucial aspect for both the FPIC principle and participatory democracy, as the success of every project hinges on the harmony and cooperation amongst all role players.

Furthermore, the FPIC principle embodies specific rights-based entitlements such as human rights, the right to development, sustainable development and participatory democracy. These rights form an integral part of international development dispensations and are fortified by international instruments, such as agreements, committee recommendations, resolutions, programmes, forums, and institutions. Moreover, the main feature cutting across all these rights-based entitlements is the public participation element in development programmes.

After establishing the nature and content of development, as well as its relationship with the FPIC principle and participatory democracy, the following sub-sections will discuss and analyse developmental strategies at national (South Africa), sub-regional (SADC), regional (Africa) and international levels, and how they embody elements of the FPIC principle and participatory democracy.

4 3 Development and the FPIC Principle within the South African Context

In South Africa, development is facilitated through policy, legislation and court cases. Significant policies in this regard include the following: the Reconstruction and Development Programme (RDP); the Growth, Employment and Redistribution programme (GEAR); the Accelerated and Shared Growth Initiative – South Africa (ASGISA); the National Growth Path (NGP) and the National Development Plan (NDP). When it comes to legislation, the South African Constitution takes the lead. The Constitution is supported by enabling legislation covering the following areas: land use and management, water management, environmental management, and mining laws.

The RDP is the leading strategy regarding developmental policies. The policy was introduced in 1994 and was described as “the foundational post-apartheid development framework upon which other initiatives are built.”¹⁰⁰ Indeed, subsequent policies, such as GEAR, ASGISA, NGP, and the NDP, were introduced to advance the objectives of the RDP. These objectives included “creating productive employment opportunities for all citizens at a working age; alleviating poverty, low wages and extreme inequalities in wages and wealth; and meeting basic needs and ensuring that every citizen enjoys a decent standard of living.”¹⁰¹

Regarding legislation, section 152(1) of the Constitution states that one of the objectives of local government is to provide and promote social and economic development.¹⁰² This constitutional obligation on local government is supported by enabling legislation such as the Development Facilitation Act, the Local Government Municipal Systems Act, the Municipal Structures Act and the Spatial Planning and Land Use Management Act. Water use and services are managed by the National Water Act, the Water Services Act, and their Regulations, whereas the Mineral

99 Thorbecke *Advancing Development* 29.

100 Okereke and Agupusi *Home-Grown Development in Africa: Reality or Illusion?* (2015) 109.

101 South African Human Development Report 2000 iii.

102 Section 152 (1) of the Constitution of the Republic of South Africa, 1996.

and Petroleum Resources Development Act and its Regulations govern mining activities in the country. Environmental matters are governed by several Acts of Parliament under the National Environment Management Act. Such Acts include the following: the National Environmental Management: Waste Act,¹⁰³ the National Environmental Management Act,¹⁰⁴ the National Environmental Management Act,¹⁰⁵ the National Environmental Management: Air Quality Act,¹⁰⁶ the National Environmental Management: Integrated Coastal Management Act,¹⁰⁷ and the Environmental Conservation Act.¹⁰⁸

The courts have also issued significant pronouncements in cases involving development matters. In the *Bengwenyama Minerals*¹⁰⁹ case, the Constitutional Court emphasised the need for meaningful engagement and consultation when mining companies deal with communities that own the land on which mining activities are to take place. Similar sentiments were expressed in the cases of *Maledu* and *Baleni*, where the courts held that prior consent was a prerequisite for development on lands owned by communities.

4 4 Development and the FPIC Principle within the SADC Region

The SADC was founded by the SADC Declaration and Treaty in 1992, with the mission to promote sustainable and equitable economic growth. This mission would be achieved through coordination and integration, efficient and effective systems, good governance, peace and security.¹¹⁰ The organisation's primary objectives were to achieve equitable and sustainable development, peace and security and economic growth, resulting in the alleviation of poverty and enhancement of the standard and quality of life of the people in the region.¹¹¹ From the outset, it is clear that both the mission and the objectives of the SADC are in line with the notion of development as described in 3.1 above, as well as the requirements of the FPIC principle and participatory democracy.

Development in the SADC is mainly driven by the Regional Indicative Strategic Development Plan 2020-2030 (RISDP) and SADC Vision 2050. The two strategic plans seek to deepen the region's integration and foster development.¹¹²

The RISDP 2020-2030 comprises three pillars. Pillar I pertains to industrial development and market integration, with a focus on the sustainable use of the region's natural resources.¹¹³ Through the Regional Infrastructure Development Plan, Pillar II seeks to contribute towards poverty eradication and improved social conditions by promoting and sustaining regional economic development. This objective is of critical importance, as Cleverdon¹¹⁴ has singled out inadequate physical infrastructure as a significant challenge facing development in the SADC region. Olamide *et al*¹¹⁵ indicate that poverty reduction within the SADC region is hindered by

103 Act 59 of 2008.

104 Act 57 of 2003.

105 Act 10 of 2004.

106 Act 39 of 2004.

107 Act 24 of 2008.

108 Act 73 of 1989 as amended.

109 *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC).

110 SADC Member States <https://www.sadc.int/member-states> (accessed 24-11-2024).

111 *Ibid.*

112 SADC <https://www.sadc.int/pillars/social-human-capital-development> (accessed 24-11-2024).

113 SADC <https://www.sadc.int/pillars/industrial-development-market-integration> (accessed 24-11-2024).

114 Cleverdon "Tourism Development in the SADC Region: The Opportunities and Challenges" 2002 *DSA* 10.

115 Olamide *et al.* "Poverty, ICT and Economic Growth in SADC Region: A Panel Cointegration Evaluation" 2022 *Sustainability* 9091.

a lack of or inadequate ICT infrastructure. Lastly, Pillar III focuses on social and human capital development, ensuring that socio-economic development is achieved in a human-centred, inclusive and sustainable manner.¹¹⁶ This objective also aligns with the requirements of FPIC and participatory democracy.

4 5 Development and the FPIC Principle at Regional Level

Strategically, development in the African continent is driven by the Agenda 2063 programme. Agenda 2063 is a strategic framework developed by the African Union in 2015 to guide Africa's socio-economic transformation over the next 50 years. Its basis is Pan-Africanism and the African renaissance, with its main aim being to create a prosperous, integrated, and peaceful continent *driven by its own citizens*. The document has also been described as “an ambitious, Pan-African people-centred vision and action plan.”¹¹⁷ The sentiments of development driven by the continent's citizens and people-centred development align with the FPIC principle, which encourages communities to take control of development activities in their territories.

Agenda 2063 outlines seven key aspirations: inclusive growth and sustainable development; political unity; good governance; peace and security; cultural identity; people-driven development; and Africa as a global player. It emphasises the importance of self-reliance, mobilisation of resources, and accountable leadership to achieve these goals. Furthermore, the document calls for the eradication of poverty, modernisation of agriculture, investment in education and technology, and the establishment of robust infrastructure and institutions. It also highlights the need for gender equality, youth empowerment, and environmental sustainability. All these elements are embedded in participatory democracy as discussed in the preceding section.

Most relevant to this discussion, the agenda encourages active participation from all African citizens and the diaspora, urging them to contribute to the continent's transformation. This is reinforced by the Agenda's vision, which seeks to establish an integrated, prosperous and peaceful Africa “where the concepts of integration, *citizen participation* and the role of robust infrastructure systems in enhancing continental competitiveness can be highlighted.”¹¹⁸ Citizen participation is key to participatory democracy and development in general.

The African developmental narrative, as discussed above, flows from the international development discourse, as will be discussed in the next section.

4 6 Development and the FPIC Principle at International Level

Globally, development has been fostered through the Millennium Development Goals (MDGs). Derived from the United Nations Millennium Declaration signed in September 2000,¹¹⁹ MDGs were eight goals that UN member states agreed and aimed to achieve by 2015. The goals were as follows: eradicate extreme poverty and hunger; achieve universal primary education; promote gender equality and empower women; reduce child mortality rates; improve maternal health; combat HIV/AIDS, malaria, and other diseases; ensure environmental sustainability; and develop a global partnership for development. The MDGs were aimed at advancing a more

116 SADC <https://www.sadc.int/pillars/social-human-capital-development> (accessed 24-11-2024).

117 De Ghetto, Green and Kiggundu “The African Union Agenda 2063: Aspirations, Challenges, and Opportunities for Management Research” 2016 *AJOM* 93–116.

118 Royo, Deep, Mukanga and Parikh “Linking the UN Sustainable Development Goals and African Agenda 20263: Understanding Overlaps and Gaps between the Global and Continental Priorities for Africa” *WDSU* 2022 100010.

119 UN “End of Poverty: Millennium Development Goals and Beyond 2015” <http://www.un.org/millenniumgoals/> (accessed 30-11-2024).

just, peaceful, and prosperous world.¹²⁰

The MDGs are credited with laying the foundation and setting the standards for international development, as the first global goals to promote and enhance development worldwide. This included affirming fundamental values such as freedom, equality, solidarity, tolerance, respect for nature, and shared responsibility, as well as calling for an end to war.¹²¹

Although the MDGs are lauded for their substantive achievements, they are, however, criticised for procedural aspects such as citizen participation and inclusivity.¹²² Fox and Stoett emphasise this point, indicating that “in the age of globalisation, citizen participation is vital for the effectiveness and legitimacy of global governance.”¹²³ This sentiment is shared by Akinsolu and Raji when they point out that “one of the failures of the MDGs was the exclusion of the CSOs from the planning and the formulation of goal-setting processes and development strategies in the beginning.”¹²⁴ As indicated in the preceding sections, participatory democracy is a key element of the FPIC principle, and the MDGs’ weakness in this respect demonstrates a substantive flaw.

The MDGs were replaced by the 2030 Sustainable Development Goals (SDGs), under the auspices of Agenda 2030. Agenda 2030 is the UN’s sustainable development strategy guiding all its member states until 2030. Primary SDG goals include the following: ending of poverty, food security, improved quality of life, inclusive and quality education, gender equality, sustainable natural resources management, promotion of inclusive and sustainable economic growth, building of resilient infrastructure, promotion of inclusive and sustainable industrialisation, combating climate change, reduction of inequality within and among countries, conservation and sustainable use of the ocean, seas, and marine resources, restoration and promotion of sustainable use of terrestrial ecosystems, promotion of peaceful and inclusive societies for sustainable development, provision of access to justice for all, and strengthening of global partnership for sustainable development.

According to Glass and Newig, they should also foster an integrated, holistic and coherent policymaking approach “where decision-making, implementation and monitoring involve actors from the public and private sector as well as civil society.”¹²⁵ Indeed, the SDGs seem to be off to a good start in terms of participation and inclusivity. Goal 16.7 talks to ensuring responsive, inclusive, participatory and representative decision-making at all levels. Boucher is of the view that “citizen participation in the implementation of the 2030 Agenda of the UN is key to fostering a sense of ownership and acceptance in working towards achieving the SDGs.”¹²⁶ If the above sentiments are anything to go by, the SDGs could be on the right track to foster the FPIC principle through participatory

120 *Ibid.*

121 Wisor “After the MDGs: Citizen Deliberation and the Post-Development Framework” 2012 *Ethics Int Aff* 114.

122 *Ibid* 119.

123 Fox and Stoett “Citizens Participation in the United Nations Sustainable Development Goals Consultation Process: Toward Global Democratic Governance?” 2016 *Glob Gov* 555.

124 Akinsolu and Raji “Civil Society Engagement in the Attainment of Sustainable Development Goals 2030” *KIU JSS* 11.

125 Glass and Newig “Governance for Achieving the Sustainable Development Goals: How Important are Participation, Policy Coherence, Reflexivity, Adaptation and Democratic Institutions?” 2019 *Earth Syst Gov* 2.

126 Boucher *Amplifying Citizen Engagement in the Localisation of the 2030 Agenda in Cities: A Framework to Promote Participation* (LLM-thesis, [Universidad Politécnica de Madrid](#), 2020) 4.

democracy. This bodes well for development as a whole.

5 CONCLUSION

This article aimed to identify the role of the FPIC principle in fostering development through participatory democracy. To achieve this objective, the following concepts were discussed and analysed in detail: free, prior, and informed consent principle; participatory democracy; and development. An endeavour was made to link the application of each of the three concepts to one another, as they are all intertwined to produce a common result: the fostering and enhancing of development.

The discussion on the FPIC principle focused on its evolution at international, regional, and national (or local) levels. International instruments and institutions have played an important role in the development and application of the principle at international level. As is the case at regional level, where conventions and tribunals have been used to ensure the application of the FPIC principle. At national or local level, it was established that the principle is still in its infancy in South Africa. It was further established, however, that although the FPIC principle is not formally recognised in South Africa and is still taking shape in the country, it has nevertheless found application through legislation such as the IPILRA and NEMA, as well as court judgments. Still on South Africa, it was established that although the principle is not explicitly mentioned in nearly any development policies or programmes, its spirit has found traction in most of them.

Regarding participatory democracy, although it is generally defined, more focus was placed on its application within the South African developmental space. It was established that the concept is embodied in the constitution, legislation, developmental policies, and the country's judicial system. The constitution laid the foundation for participatory democracy by establishing a developmental local government based on participatory governance. To support the constitutional mandate, enabling legislation was enacted on land use, environmental management, water use and management, and mining. It was further established that almost all developmental policies included an element of public participation. Finally, the courts issued profound judgments that support the application of participatory democracy in the South African developmental arena.

Regarding development, a conceptual overview was provided to establish a common understanding before undertaking a substantive analysis, especially regarding the linkage between the FPIC principle and development. The positions of South Africa, SADC, Africa and at international level regarding the application of the FPIC principle and participatory democracy within the developmental arena were discussed in detail. It was finally established that the requirements of the FPIC principle are embedded in participatory democracy and serve as a catalyst for advancing and enhancing development globally.